IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1944

No. [redacted] 73

ARMOUR AND COMPANY, a Corporation,
Petitioner,

against

ADAM WANTOCK and FRANK SMITH,
Respondents.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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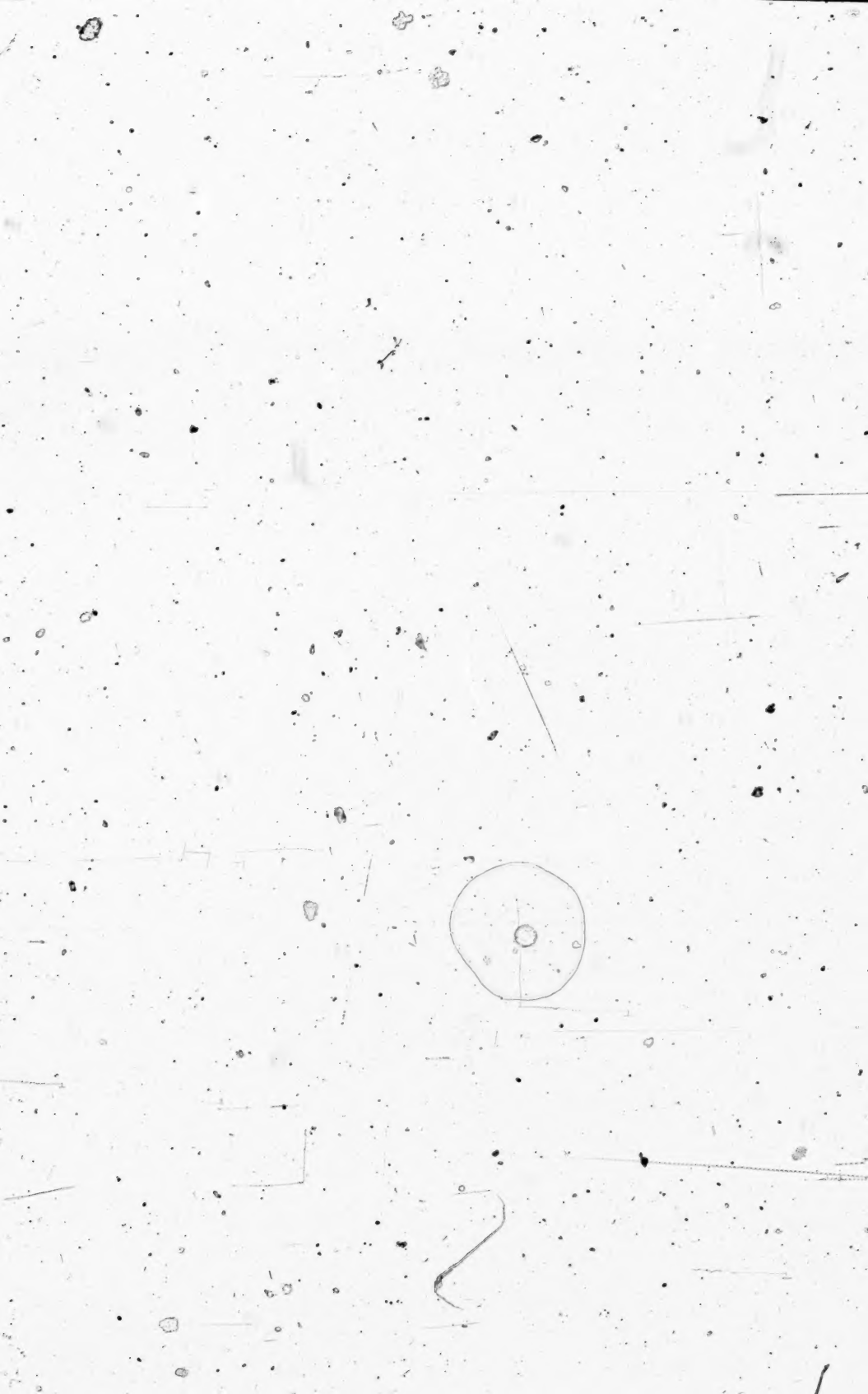
INDEX.

TABLE OF CASES CITED.



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FOREWORD.

This Petition presents two undecided questions of vital importance to American industry at the present time. The pattern is one entirely familiar in American jurisprudence. Congress enacts a statute which must perforce be expressed in general terms. Those general terms create no sharply drawn line marking the exact boundaries of coverage. Rather, the general language of the Statute creates a somewhat shadowy boundary zone,—a twilight or no man's zone, which has some-

where within it an exact boundary line of coverage. But that exact boundary line can only be found by trial and error. As specific case after specific case arises within this twilight zone, this Court by declaring a case to be within or without the exact boundary line, ultimately transforms the uncertain zone of general language into a sharply drawn boundary line of exact coverage.

In the early days of the Act, no employer could be certain whether or not any incidental employee, not directly engaged in commerce or in production of goods for commerce, was covered by the Act. But by process of trial and error and judicial definition, the original twilight boundary zone has been narrowed. On the one hand, this Court has specifically held that not all employees of an employer who is engaged in interstate commerce are covered by the Act. (*Kirschbaum* v. *Walling*, 316 U. S. 517.) From the same decision we know that building service employees, and watchmen, are covered by the Act, provided a sufficiently "close and immediate tie" to production exists, even though such employees produce no goods themselves.

A decision of this case will advise whether the watchman is the extreme limit of coverage, or whether the Act extends to an employee whose connection with the production of goods is far more remote than that of the watchman; who is *not permitted in the plant* save for special duties, and who does nothing in the aid of production, save on rare occasions (approximately once a month), when the watchmen who *are primarily* charged with the responsibility of protecting the plant and the goods therein from fire, theft or loss, calls this employee to his assistance in such rare emergency.

A decision of this case will also resolve another undecided question, the question of the status under the

Act of "stand-by" or "on call" time during which the employee is free to do as he pleases, subject only to availability if the need for his services arise. The question presented is whether an employee under these conditions is being "suffered or permitted to work" and therefore "employed" within the specific definitions of the Act.

We respectfully submit that these are important and undecided questions of great importance, as to which the decisions of the Circuit Courts are in irreconcilable conflict.

The opinion of the Circuit Court here assailed was a divided opinion, one Circuit judge dissenting.

All emphasis in quoted statutes or decisions are by the author unless otherwise indicated in the text.

The Statutes Involved.

The following statutes are involved:

Section 203(g), Section 203(j) and Section 207(a) of the Fair Labor Standards Act (Title 29 U.S.C.A.), set forth in full as appendix A hereto, page 31 *post*.

Opinions of the Courts Below.

The opinions of the United States District Court for the Northern District of Illinois, Eastern Division were filed October 2, 1942 and May 18, 1943. They are not reported in the Official Reporter System, but appear in 6 Labor Cases 61,313, and 7 Labor Cases 61,681. They also appear at pages 7 and 29 of the transcript of record filed herewith.

On appeal therefrom, the affirming opinion of the United States Circuit Court of Appeals for the Seventh Circuit was filed on February 5, 1944. It is reported

in 140 Fed. (2d) (Adv. Op.) 356, and is set forth in full beginning at page 42 of the record filed herewith.

Grounds for Jurisdiction.

The grounds for jurisdiction are fully set forth at pages 5-6 of the Petition filed herewith. Briefly the case involves the interpretation and application of an Act of Congress, the Fair Labor Standards Act, U.S.C.A. Title 29.

Statement of the Case.

This case involves the application of the Federal Fair Labor Standards Act, above cited, to employees engaged in earning a livelihood under the conditions set forth below.

The facts presented here are in no wise disputed, being either stipulated or established by unchallenged testimony. They are fully set forth with approximate record page references at pages 2 to 5, both inclusive, of the Petition filed herewith.

Summarized they are as follows:

Petitioner is an employer engaged in the production of goods or goods for commerce. At the plant involved it manufactures soap and allied products, and employs some 1200 production, maintenance, and protective workers (watchmen, patrolmen, etc.), none of which are involved here.

Petitioners' executives charged with the insuring of its properties against fire have elected to supplement the protective service of the City Fire Department and to maintain at this establishment private fire engine, and fire fighting equipment, and to employ respondents as professional fire fighters, in charge of this and other

fire-fighting apparatus located on the premises. No executive of the Company in charge of production or maintenance of the plant has any voice in the establishment or its withdrawal of this auxiliary fire protective service.

Respondents are professional fire fighters employed solely to maintain and operate this auxiliary fire-fighting apparatus and equipment. These employees are in residence in the Company fire hall every alternate 24-hour period. For the first 9 of such 24 hours (excepting a half-hour lunch period) they perform physical labor, but solely in the inspection and maintenance of the Company's fire-fighting apparatus. They produce nothing. They service, repair, or maintain no building, machinery, or apparatus used in any way in producing goods, at any time.

At the end of this 9-hour period, these employees retire to the fire hall. A force of watchmen take over the custody of the plant and the goods contained therein. During this period the firemen are not permitted to go into the plant area except when called by the watchmen in charge, to fight a fire or repair a defect noted in fire-fighting apparatus. Such calls by the watchman averaged about one per month over a period of several years, and caused the firemen to be absent from the fire hall an average period of less than one hour per call.

Save for this once per month interruption, these firemen, on reaching the fire hall at 5 P. M. and until leaving for their homes at 8 A.M. the following morning, were free to eat their evening meal when they pleased. They were free to prepare it in the fire hall on facilities furnished by the Company, or retire to a nearby restaurant.

Before and after this meal they were free to sleep, when and as long as they pleased; or, if they elected

they could and did play cards, listen to the radio provided for them, write letters, or occupy themselves as they pleased. The two firemen involved here were paid weekly salaries of approximately $30 and $35, whether in residence at the fire hall three days, or four days per week.

Limitation of the Original Issue.

The respondents claimed they were covered by the Act, and were "employed," *i.e.* being "suffered or permitted to work" during the entire 15 hours in controversy. The Company denied coverage, and contended that only such portion of the 15 hours as was spent answering fire calls was working time. The alternate day basis of employment produced 3 periods in residence of 24 hours, or 72 hours alternate weeks, and 4 periods in residence of 24 hours, or 96 hours the intervening weeks. Respondents' theory produces alternately 32 and 56 hours of weekly overtime. Under the Company's contention, working time was alternately, 3 x 8½ hours, and 4 x 8½ hours per week, plus the time spent during any week in answering one of the rarely occurring fire calls after 5 P. M., and before 8 A.M. the following morning.

The District Court accepted neither view. From the 15-hour period in controversy on alternate days, the District Court deducted one hour as the evening meal time, and 7 hours as sleeping time, holding the men were not "employed" while so eating and sleeping. But the District Court held that all time spent in playing cards, reading, or occupying themselves as they pleased, was time during which they were being "suffered or permitted to work" within the meaning of the Act.

The respondents took no appeal from the decision of the District Court. Therefore the only questions passed upon by the Circuit Court were (1) the coverage of the

Act and (2) the propriety of the ruling that time spent reading or playing cards, etc., was working time.

Specification of Errors.

1. The Circuit Court erred in failing to follow the decision of the Circuit Court of the Fifth Circuit in *Skidmore* v. *Swift and Company,* 136 Fed. (2d) 112, * in which it was held that auxiliary firemen were not "at work" while playing cards or reading in the fire hall; and erred in holding that the status of an employee under the Act was affected by the manner in which he was paid, *i. e.* on the weekly basis or on the hourly basis.

2. The Circuit Court erred in failing to apply the rules laid down by this court in *Tennessee Coal I. & R. R. Co.* v. *Muscoda Local 123,* Case No. 409, decided March 27, 1944; and in failing to hold that "employment" as defined in the Act, did not mean mere appearance on the Company payroll, but required the performance of some physical or mental work controlled by, and of value to, the employer.

3. The Circuit Court erred in assuming that all employees whose names appeared on its payroll of a Company engaged in the production of goods for commerce, were within the coverage of the Fair Labor Standards Act, unless specifically exempted in the Act; thereby failing to follow the decisions of this Court in *Kirschbaum* v. *Walling,* 316 U. S. 517.

4. The Circuit Court erred in failing to consider or give any force or effect to the rules and regulations of the administrative agency charged with the enforcement of the Act; and in failing and refusing to follow such rules and regulations without pointing out any respect in which they were unlawful or deficient.

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* Certiorari denied, Oct. 11, 1943, ... U.S. ....., 88 L. Ed. adv. op. 36.

5. The Circuit Court erred in failing to interpret the Fair Labor Standards Act as interpreted by this court in *Kirschbaum* v. *Walling*, 316 U. S. 517, and thereby extended the coverage of the Act to employees who were not "indispensable" to production of goods; who had no "close and immediate tie" to the process of production; and whose duties were not such that other employees "could not engage" in production but for the employment of the men in question.

SUMMARY OF ARGUMENT.

PART I. The majority opinion of the Circuit Court errs in holding that the employees in question were "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

(1) Exclusion may be accomplished by omission or by specific exemption.

(2) The majority opinion overlooks exclusion by omission.

(3) The majority erroneously assumes mere presence of a name on the payroll to result in coverage by the Act.

(4) By erroneous interpretation of the Statute, the majority overlooks controlling undisputed facts.

PART II. The majority opinion erred in holding that employees playing cards, resting, listening to the radio or otherwise relaxing or amusing themselves as they pleased were "employed" during such period, as that term is defined in the Act.

(1) The statute contemplates actual work, not mere recreation on the employer's premises.

(2) The majority opinion of the Circuit Court failed to consider, apply or criticize the

interpretations of the Wage and Hour Administration, describing the status of employees of this type under the Act. This was obvious error under the decisions of this Court.

(3) The error of the majority opinion in failing to consider the Interpretative Bulletins, as other courts had done, led to irreconcilable conflict between the decision of this court, and the decisions of the Circuit Court for the Fifth Circuit.

(4) The majority opinion of the Circuit Court is contrary to the great weight of authority.

(5) The majority opinion of the Circuit Court is at variance with the decision of this court in *Tennessee Iron, Coal and R. R. Co.* v. *Muscoda Local No. 123,* Case No. 409, decided March 27, 1944.

(6) The erroneous conclusion apparently required by the majority opinion is that any interference with an employee's freedom in the absolute, constitutes "work" within the meaning of the Act.

ARGUMENT.

Introduction.

Of the two questions passed upon by the Circuit Court the most basic is the question of whether employees such as are here involved are within the coverage of the Act at all. Only after an affirmative decision of this question does the second question (*viz.*, does reading and card playing constitute "work" or "employment"), become controlling. We first discuss the error of the majority opinion of the Circuit Court on this basic question.

Part 1. The majority of the Circuit Court errs in holding that the employees in question were "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

(1) *Exclusion may be accomplished by omission or by specific exemptions.*

As this Court has pointed out, the Congress, in enacting the Fair Labor Standards Act clearly demonstrated their intention to invade the field of commerce to far less extent, as to wages and hours, than in the case of Labor Relations.* This intended lack of full coverage of the field involved creates two tests which must be applied to determine the coverage of any particular employee. First, we must find whether he was ever within the limited portion of the field of commerce which Congress elected to cover. If he is not he is excluded from the coverage of the Act. If he is within that limited portion of commerce covered by Congress, we must next ascertain whether there is any specific exemption found in the Act which specifically excludes

* *Kirschbaum* v. *Walling*, 316 U.S. 517.

him, although covered by the general terms of the Act. And we are to decide the question by the employee's occupation, not by the employer's occupation.*

The two types of exclusion may be illustrated by considering two truck drivers working out of two adjacent places of business in New York City. The one establishment confines its efforts solely to sales and deliveries on Manhattan Island. Their driver makes no interstate deliveries or pickups, and handles no interstate business. That driver is excluded from the Act because he neither engages in any interstate commerce or produces any goods.

The neighboring driver makes daily trips into Connecticut. He is plainly engaged in interstate commerce, and is within the coverage of the Act. But being under the jurisdiction of the Commerce Commission he is exempt, under Section 213(b) 1.

(2) *The majority opinion overlooks inclusion by omission.*

We think it evident that the majority of the Circuit Court failed to consider the first type of non-coverage,—the employee whose lack of coverage arises from his never having been engaged in any occupation described, as a condition precedent to coverage by the Act. We draw our conclusion from the following language in the decision of the Circuit Court:

> "Section 207 is definite and specific and provides that: 'No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce-
>
> '(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

* *Overnight Motor Transp. Co.* v. *Missel*, 317 U.S. 706.

'(2) * * *,
'(3) * * *,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.' (sic.)

"Then follow exceptions wherein definitions are given of the instances where the employer would not be deemed to have violated this section. None of the exceptions includes a situation such as is here disclosed.

"If there is to be an exception, *in addition to those specifically made,* added to Section 207, it is for Congress rather than the courts to make it."

If we have interpreted this language correctly, the majority finds the respondents covered by the Act, solely because no specific exceptions could be found in the language of the Act, exempting them therefrom.

This we believe to be error, in that the majority failed to consider the other method of Congressional exclusion from coverage, *viz.*, the failure to make an original inclusion of the employee in the first instance. Such exclusion is clearly recognized by this Court in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; and in *Kirschbaum* v. *Walling*, 316 U. S. 517.

(3) *The majority erroneously assumes mere presence of a name on the pay roll to result in coverage by the Act.*

As pointed out in those decisions, Congress included under the coverage of the Act only those engaged in "commerce" or in the * * * "production of goods for commerce." Then, to clarify this language, Congress defined "produced" as meaning "produced, manufactured, mined, handled or in any manner worked on in any state"; and provided that it should include the services of any em-

ployee employed* "in any process or occupation necessary to the production" (mining, handling, etc.) "thereof in any state."

This statutory definition, and particularly the word "necessary" has been carefully considered and interpreted by this Court in *Kirschbaum* v. *Walling*, 316 U. S. 517, and in *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88. Words and phrases used in those decisions as synonymous are; "without which" the producers "could not engage"; "indispensable"; "such a close and immediate tie with the process of production * * * as to be an *essential* part of it;" **

The majority opinion of the Circuit Court, by another paragraph in the decision, seems to indicate that the word "employee" means any person whose name appeared on the Company's payroll. We draw this conclusion from the following language of the Court:

> "The only legal question, as we see it, is, therefore, directed to the ascertainment of the legal status of the plaintiffs to the defendant during those periods when they were subject to call as auxiliary firemen. Notwithstanding the latitude they had in their activities, we are convinced that *their legal status was that of employee* during that time."

The mere status of respondents here as an "employee" *i.e.* on the payroll, is not, we respectfully urge, sufficient to bring these respondents under coverage of the Act. Only such employees as are engaged in the occupation

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* The statutory definition of the word is later considered.

** This same requirement of "essentiality" as proof of the occupation being "necessary" to the production of goods also appears in the very recent decision of this Court in *Tennessee Coal, Iron and R. R. Co.* v. *Muscoda Local No. 123*, Case No. 409, decided March 27, 1944, in the following language, describing the nature of the occupations of the miners during the period of time required to travel from the mine portal to the working face:

> "The extraction of ore from these mines by its very nature necessitates dangerous travel in petitioners' underground shafts in order to reach the working faces, where production actually occurs. Such hazardous travel is thus *essential* to petitioners' production."

of actual production, or in one "indispensable" to production; or having such a "close and immediate tie" to production, as to be "an essential part of it," are originally covered by the Act.

(4) *By erroneous interpretation of the Statute, the majority overlooks important undisputed facts.*

We think that because of this legal misconception and misinterpretation of the Circuit Court, it brushed aside the following undisputed and controlling facts as irrelevant.

1. We think it to be elementary reasoning, to assume that any service or employment "necessary" to the production of goods should be found to exist in *most* of the plants manufacturing such goods. Here we have a most anomalous situation. The undisputed record shows that *none* of the large companies producing goods of this type for commerce, find it "necessary" to hire any such employees as these.

Not one of the four plants of Lever Brothers in this Country, maintain any fire truck or paid firemen (R. 21). The thirteen plants of Procter and Gamble in this Country, all manufacture goods for interstate commerce. With two exceptions none of these plants employ as much as one full time man whose duties have to do with fire protection. Even those employees whose time is so devoted work but eight hours per day (R. 23-25).

The Colgate Palmolive Peet Company operates five plants in the United States all producing soap for interstate commerce. Not one plant has a fire hall, a fire engine, nor an employee whose sole duty is to maintain fire-fighting equipment and fight fires (R. 25, 26).

Armour and Company operates another soap factory

producing goods for commerce. No such equipment or personnel is maintained there (R. 20).

Thus we have the anomalous situation of the majority decision holding a certain service or facility to be "necessary" to "production" at one plant when it is undisputed that throughout the twenty-three largest plants in the industry, the use of any such service is entirely unknown.

The erroneous reasoning of the District Court, accounting for the disregard of these undisputed facts, as affirmed by the Circuit Court is clearly expressed. Referring to the maintenance of such service, Judge Holly said (emphasis supplied):

> "My opinion is they do maintain it, *whether it is necessary or not*, and the persons there are engaged * in interstate commerce." (R. 20, 21.)

We think a homely analogy is illustrative here. Conceding that a plant foreman requires a desk to "produce goods," it follows that an employee making such a desk for the foreman is engaged in an occupation necessary for the production of goods for commerce. But it does not follow that the services of another employee, hired to inlay the foreman's name in gold, in the wood of such desk, after it is built and in use, is also necessary to the production of goods for commerce, merely because *a desk*, is an essential.

The analogy is that in more than twenty of the largest soap making plants in the United States,—the protection of the City Fire Department,—an ordinary desk, is used. In the single plant here involved, employees are hired to supply a service required at no other plant similarly producing goods for commerce. We think this to be an important fact to be considered in inter-

* The context indicates Judge Holly's meaning to have been "engaged in the production of goods for commerce."

preting the word "necessary." There is no evidence here of any unusual condition requiring such additional fire protection at this single plant.

2. At no time were these respondents charged with any responsibility for patrolling or otherwise detecting a fire or theft or damage, of or maintaining or repairing any production apparatus used in producing goods. If a fire damaged a machine or a building, these men had no responsibility for detecting the fire or no responsibility for repairing the damaged property. Such duties were performed by regular maintenance and repair men.

3. No executive officer of the Company controlling production of goods, has any voice in deciding whether to maintain such added protective service, or when to discontinue it. Those questions are decided by executives having no control over production of goods.

Conclusion of Part I.

We believe that these facts, when considered with a correct interpretation of the statute, establish that the respondents here are much further removed, in their relation to production of goods, than are the watchmen and other employees constantly rendering protective service to the plant and the goods contained therein. Conceding, the fire protective service of the City Fire Department is "necessary" to the production of goods; there is no fact or circumstance shown in this record, indicating any "necessity to production" for the maintenance of the additional fire protection afforded by these respondents.

Part II. The majority opinion erred in holding that employees playing cards, resting, listening to the radio or otherwise relaxing or amusing themselves as they pleased were "employed" during such period as that term is defined in the Act.

(1) *The statute contemplates actual work, not mere recreation on the employer's premises.*

The prohibition of Section 207(a) of the Act is against the "employment" of an employee without compliance with the remaining requirements of that section. Ordinarily, we think (as the majority apparently thought), of the term "employee" as including any person appearing on the Company's payroll. But we are foreclosed from such interpretation because of a statutory definition of the word "employ" found in the Act, Section 203(g), which defines "employ" as "to suffer or permit to *work*."

The mere substitution of the statutory definition of "employ" for the word as used in Section 207, makes that section even more "definite and specific" than the version used by the Circuit Court. With such substitution, Section 207 reads thus (substitution emphasized):

> "No employer shall * * * *suffer or permit* any of his employees who is engaged in * * * production of goods for commerce, to *work* for a work week longer than * * * forty hours, unless such employee receives compensation for his *suffered or permitted* work, in excess of the hours above specified at a rate not less than one and a half times the regular rate at which he is *suffered or permitted to work*."

Assuming the employees involved here to be covered by the Act we think the error of the Circuit Court in holding that the respondents here were being "suffered or permitted to work" while free to occupy themselves as they chose at any selected form of relaxation or rec-

reation, is established on any one of three grounds, which are:

1. The interpretations of the law issued by the administrative agency charged with its enforcement.

2. The conflicting decision of the Circuit Court of Appeals for the Fifth Circuit in *Skidmore* v. *Swift and Company*, 136 Fed. (2d) 112. (Cert. denied, Oct. 11, 1943, ... U.S. ....., 88 L. Ed. adv. op. 36.)

3. The conflict with the great weight of authority.

4. The decision of this Court in *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local 123*, Case No. 409, Decided Mar. 27, 1944.

(2) *The majority opinion of the Circuit Court failed to consider, apply or criticize the interpretations of the wage and hour administration, describing the status of employees of this type under the act. This was obvious error under the decisions of this court.*

We have set forth in full, Paragraph 7 of Interpretative Bulletin No. 13 of the Wage and Hour Administrator. This bulletin was issued in July 1939, just after the Act became effective, and is still in effect. It reads as follows:

"7. In some cases employees are engaged in active work for part of the day but *because of the nature* of the job are also required *to be on call for 24 hours a day*. Thus, for example, a pumper of a stripper well often resides on the premises of his employer. The pumper engages in oiling the pump each day and doing any other necessary work around the well. In the event that the pump stops (at *any* time during the day or night) the pumper must start it up again. Similarly, caretakers, custodians, or watchmen of lumber camps during the off season when the camp is closed, live on the premises of the employer, have a regular routine of duty but are subject to call at any time in the

event of an emergency. The fact that the employee *makes his home at his employer's place of business* in these cases does *not* mean that the employee is necessarily *working* 24 hours a day. In the ordinary course of events the employee has a *normal night's sleep, has ample time in which to eat his meals,* and has a *certain amount of time for relaxation and entirely private pursuits.* In *some* cases the employee may be free to come and go during certain periods. Thus, here again the facts may justify the conclusion that the employee is *not working at all times during which he is subject to call in the event of an emergency,* and a reasonable computation of working hours in this situation will be accepted by the Division."

In view of the fact that the employees here involved had their 15-hour period of rest and relaxation interrupted by service calls requiring but *one hour's* time every fourth week, Paragraph 6 of this Interpretative Bulletin is also pertinent:

"6. In a few occupations *periods of inactivity* need not be considered as hours worked, even though the employee is subject to call. The answer will generally depend upon the *degree to which the employee is free to engage in personal activities during periods of idleness* when he is subject to call and the *number of consecutive hours that the employee is subject to call without being required to perform active work,—i.e.,* the *frequency* with which the employee is called upon to engage in work. In these cases the nature of the employee's work involves *long periods of inactivity* which the employee may use for *uninterrupted sleep,* to conduct personal business affairs, to carry on a normal routine of living, etc. A good example of this is the employee of a small telephone exchange operating a switchboard located in the employee's house. During the night no one is in direct attendance at the switchboard and an alarm bell awakens the operator if a subscriber wishes to make a telephone call. The operator has her bed alongside the switchboard and

> is able to get *several hours of uninterrupted sleep* every night, as experience over a considerable period of time may often demonstrate. Thus, if over a period of several months a telephone operator has been called upon to answer *only a few calls* between the hours of 12 and 5 in the morning a segregation of such hours from hours worked will probably be justified."

We think these expressions clearly establish that the Wage and Hour Administrator considers that the respondents here are not at "work" between 5 P.M. and 8 A.M. of their 24-hour period in residence, except for an average of *one hour every fourth week*. We think the Circuit Court erred grievously in failing to consider, apply, criticize or even mention these long standing interpretations of the Act by the administrative agency charged by Congress with the enforcement of the Act. While such interpretations are not binding on the Courts, it has been repeatedly held that unless such interpretations are obviously *ultra vires*, or unlawful, the Courts should accord great weight to them. *United States* v. *Johnston*, 124 U.S. 236; *Swift Co.* v. *United States*, 105 U.S. 691; *Five Per Cent Cases*, 110 U.S. 471; *U. S.* v. *Philbrick*, 120 U.S. 52; *Dismuke* v. *U. S.*, 297 U.S. 167; *Brewster* v. *Gage*, 280 U.S. 327; *U. S.* v. *C. N. S. & M. R. Co.*, 288 U.S. 1; *U.S.* v. *American Trucking Assn.*, 310 U.S. 534; *Sanford* v. *Commissioner of Internal Revenue*, 308 U.S. 39; *Kessler* v. *Strecker*, 307 U.S. 22.

(3) *The error of the majority opinion in failing to consider the interpretative bulletins, as other courts had done, led to irreconcilable conflict between the decision of this court, and the decisions of the Circuit Court for the fifth circuit.*

The almost identical factual situation presented here, and to the Circuit Court for the Fifth Circuit in *Skidmore* v. *Swift and Company*, 136 Fed. (2d) 112, is more

evident if we quote from the decision of that case by the District Court (6 Labor Cases 61,629) as well as from that of the Circuit Court.

The District Court said:

"For their allotted time at the fire hall, they were required to be there. It was their duty as much as performing their regular work, only that, except for such emergency calls, which were few, they could spend their time, *'talking, reading, bathing, dressing, shaving, sleeping, playing pool, dominoes, checkers and other games, listening to the radio.'*"

"Of course we know pursuing such pleasurable occupations or performing such personal chores, *does not constitute work.* But does the fact they were subject to calls, though rare, make such hours, so spent, work hours under the Act for which overtime compensation is due them? That is the initial question. I do not think so. *The Administrator's ruling on this subject strikes me as right*:"

* * *

"Plaintiffs' counsel rely more upon the nightwatchmen, police, and firemen cases, such as these: *Fleming* v. *Swift & Co.*, 4 WHR 628 (4 Labor Cases, 60,685); *Fleming* v. *Rex Oil Co.*, 4 WHR 628 (5 Labor Cases, 60,765), Nov. 7, Mich. U. S. Dist. Ct.; *Campbell* v. *Superior Decalcomania Co.*, 31 F. Supp. 663, 41 WHR 628 (2 Labor Cases, 18,590); *Missouri, Kansas & Texas* v. *U. S.*, 231 U. S. 112; *Chicago, Rock Island & Pacific Ry. Co.* v. *U. S.*, 253 U. S. 555; *Travis v. Ray*, 4 WHR 580, 41 F. Supp. 6 (4 Labor Cases, 60,703); *Interpretative Bulletin of W & H Admr.* #13, Pars. 2, 4, 5, 6, 7.

"Those cases *do not control here.* Of course it is often true that waiting time or even subject to call time should be treated as work, such as *Missouri, Kansas & Texas Railway Co.* v. *U. S.*; *supra*, and other cases cited by plaintiffs."

(*Skidmore v. Swift & Co.*, 6 Labor Cases 61,269.)

In affirming this decision, the Circuit Court of Appeals had this to say:

> "The fire hall was equipped with steamheated, air-conditioned sleeping quarters, with a pool table, domino table, and radio for the comfort, convenience, and relaxation of the men. Plaintiffs could retire at their pleasure, and sleep throughout the night unless one of the rare alarms sounded, in which event they responded and were paid for so doing.
>
> "These facts give rise to the inquiry whether under the Fair Labor Standards Act an employee is *working* when he is *sleeping, playing pool, dominoes, or the radio,* merely *because he has agreed to stay on the employer's premises and be available in case of an alarm.*
>
> "The mere fact that a servant has agreed to live on the place *does not justify the conclusion that he is engaged in commerce even though his employer may be.* One must sleep whether at home or abroad, nor is he at work when he is asleep. The vice of long hours of toil is *not present here.* The employees worked eight hours during the day and *rested, relaxed, played* or *slept* on nights in the hall according to the pleasure of each."
>
> * * *
>
> "The Act does not require payment of wages to an employee *merely because he is away from home.* Nor does the Act undertake to regulate or restrict reasonable and *bona fide* agreements whereby an employee agrees to be available if needed. *'Working is not synonymous with 'availability for work.'"*
>
> (*Skidmore v. Swift & Co.*, 136 Fed. (2d) 112 at 113.)

In both decisions of this case the Courts carefully considered the interpretations of the Wage and Hour Administration (hereinbefore quoted) and held them to be correct. The majority in the case at bar entirely ignores

those interpretations although they were before the court.

We frankly confess our failure to comprehend the language of the majority opinion of the Circuit Court, wherein it attempts to distinguish this case from the *Skidmore* case in the following language:

> "(b) On the second question, appellant cites, and relies heavily on, *Skidmore* v. *Swift & Co.*, 136 F. 2d. 112, which is nearly in point, but is distinguishable in fact from the instant case in that there the employer and employee agreed to special separate compensation in case the employees received a fire call. Appellant attempted to avoid this fact distinction by saying that here the employees were paid for the fire call service on the basis of weekly compensation whereas in the *Skidmore* case, the employees were paid extra, on an hourly basis, for answering fire alarm calls."

As we interpret this language, perhaps incorrectly, it means that a basic difference exists in the application of the law for card playing time, to a fireman whose hourly rate of pay is drawn only when answering fire calls, as compared to another whose compensation for answering fire calls is on a weekly basis.

The important fact is that each of the employees in this case, and each of the employees in the *Skidmore* case, were seeking to have their basis of pay, *whatever it was*, extended across a period of time when they were playing cards or otherwise recreating in the fire hall. If any overtime were due the employees in this case, such overtime could be computed only by reducing the weekly rate of pay and thereby *deriving an hourly rate*, to be used in computing any overtime due.

The firemen in the *Skidmore* case asked the application of 150 per cent of their hourly rate applied to all working, card playing and sleeping hours, in excess of

40 per week. The firemen respondents here ask identically the same thing. The only difference is that here, we must first *compute* the hourly rate, used as a basis for overtime which may be due these firemen, from a weekly rate. In the *Skidmore* case the hourly rate was specific.

With this fact in mind we respectfully submit that the unanimous opinion of the *Skidmore* case and the majority opinion in this case are in hopeless and irreconcilable conflict.

(4) *The majority opinion of the Circuit Court is contrary to the great weight of authority.*

Other State and Federal Courts have similarly construed the word "employ" as used in Section 307 of the Act.

In *Super-cold Southwest Co.* v. *McBride*, 124 Fed. (2d) 90, the Circuit Court for the Fifth Circuit said:

> "* * * we think it clear, that the mere statement that he was 'on call' without more, in the face of the record which shows that a person 'on call' merely had to leave his telephone number or place where he could be found, is *not proof* that he was *engaged in work* either regular or overtime within the meaning of the Fair Labor Standards Act."

In *Buckner* v. *Armour and Company*, 6 Labor cases, 61,270, the United States District Court in Texas said:

> "* * * that the night hours spent by the plaintiff in the fire hall, subject to call as above explained, is *not work* as contemplated by the Act."

In *Cordell* v. *Wilcox*, 5 Labor Cases 60,807, the United States District Court for the Northern District of Oklahoma treated a similar case as follows:

> "It is my opinion that the court * * * must determine that question on the basis of the time during which the employee was *actually engaged in the*

performance of some service in furtherance of the interests of his employer. Of course, all of these pumpers are required to be available on the lease for some period of time during the day other than the time during which they are actually required to perform some service for the employer. It is necessary for them *to be available* to take care of any breakdowns and attend to any trouble that might develop in connection with the pumping of a well. But I don't think the law contemplates that an employee is to be compensated for all the time that he is *required to be available* there on the lease for *work* in the event something should develop that would require his attention."

In *Walling* v. *Pine,* 6 Labor Cases 61,189, the same Court ruled similarly on a similar question.

In *Perry* v. *Livermore,* 165 S.W. (2d) 782, the Court considered a very similar case, where the employee was required to remain on the employer's premises twenty-four hours per day. He could arrange for his wife to be there in his stead, or he could hire a third person to assume his duties, if he wished to leave. The Texas Court of Civil Appeals said:

"In reaching this conclusion, we are not unmindful that there may be circumstances under which an employee would be entitled to be paid for waiting time or watching time, but in each such instance we are confident that *more services of a personal nature* would be demanded than *merely to live on the premises.* In harmony with the opinion of the Administrator, as above expressed, we do not think it was contemplated by the Congress that such an employe as we have in this case should be compensated for the time he spent in *sleeping, eating, relaxing, or otherwise engaging in entirely private pursuits, either on or off the premises of his employer.*"

A telephone operator, having the telephone exchange in her home, and required to provide uninterrupted exchange service 24 hours per day, was held not to be

working for that entire period. (*Munn* v. *Southwestern States Co.*, *D. C. Texas*, 5 Labor Cases 61,011.)

In most of these cases, the decision of the court recites that the conclusion was influenced by the interpretations of the Wage and Hour Administrator on the question. The courts quote, or refer to interpretations 6 or 7 of Interpretative Bulletin No. 13 of the Wage and Hour Administration, which we have hereinbefore set forth in full. The majority opinion fails to note or give evidence to those interpretations thereby departing from the weight of authority.

(5) *The majority opinion of the Circuit Court is at variance with the decision of this court in Tennessee Coal, Iron and R. R. Co.* v. *Muscoda Local No. 123*, Case No. 409, decided March 27, 1944.

We cannot fairly say that the majority of the Circuit Court ignored the pronouncements of this Court, as the majority opinion in the case at bar preceded the decision cited in the above title by several weeks.

The pronouncement of this Court in the *Tennessee* case, is of vital importance here, since it resolves the conflict between the majority opinion here, and the unanimous opinion in the *Skidmore* case, in favor of the *Skidmore* decision, and of the dissenting judge in the case at bar.

From the following extract from the Supreme Court opinion it will be noted that this Court was considering the collective effect of the identical sections of the Act involved here; *viz*: Section 203(g), defining "employ"; Section 203(j) defining "produce"; and Section 207(a).

> "In determining whether this underground travel constitutes compensable work or employment within the meaning of the Fair Labor Standards Act, we are not guided by any precise statutory definition of work or employment. Section 7(a) merely

provides that no one, who is engaged in commerce or in the production of goods for commerce, shall be employed for a workweek longer than the prescribed hours unless compensation is paid for the excess hours at a rate not less than one and one-half times the regular rate. Section 3(g) defines the word 'employ' to include 'to suffer or permit to work,' while Section 3(j) states that 'production' includes 'any process or occupation necessary to * * * production.'"

In defining what constituted "work" this Court said:

"Accordingly we view Sections 7(a), 3(g) and 3(j) of the Act as necessarily indicative of a Congressional intention to guarantee either regular or overtime compensation for all *actual work* or employment."

* * *

"We cannot assume that Congress here was referring to *work* or employment *other than as those words are commonly used*—as meaning *physical or mental exertion* (whether burdensome or not) *controlled or required* by the employer and pursued necessarily and primarily for the benefit of the employer and his business."

This language gives life to this Court's refusal to grant certiorari in the *Skidmore* case. It would seem to require not only certiorari, but total reversal of the majority opinion of the Circuit Court involved here.

We note the following distinctions between the facts there and here:

1. Physical or mental labor and effort was performed during the interval in question in the *Tennessee* case, which was essential to the production of goods. No such effort was expended here.

2. During all the time in question *every act* of the employee was controlled by the employer. Here, the employer "controls" the employee approximately one hour,

on the average, every fourth week, when a fire call is made.

3. In the *Tennessee* case the employee in *no* part of the time in question was free to relax, change occupations, sleep, or select whatever pastime appealed to him. During *all* the time involved here (save one hour every fourth week), such freedom was available to and exercised by the employee in the case at bar.

(6) *The erroneous conclusion apparently required by the majority opinion, is that any interference with an employee's freedom in the absolute constitutes "work" within the meaning of the Act.*

The majority opinion obviously interprets employment as merely being on the payroll. We quote:

> "Notwithstanding the latitude they had in their activities, we are convinced that their legal status *was that of employee* during that time."

That opinion also implies that every person on the Company payroll ("employee") is covered by the Act unless specific exemption covering him can be found in the Act. After quoting the Act, the majority said:

> "Then follow exceptions wherein definitions are given of the instances where the employer would not be deemed to have violated this section. None of the exceptions includes a situation such as is here disclosed.
>
> "If there is to be an exception, *in addition to those specifically made*, added to Section 207, it is for Congress rather than the courts to make it."

The error in these holdings we think we have shown. But if we carry the reasoning of the majority opinion one step further, a most dangerous situation appears which we think clearly requires consideration of this Court.

By affirming the District Court, the majority affirmed

the following language of that Court, in finding the firemen covered by the Act. Speaking of the time spent playing cards, the District Court said:

> "The employee during that time has not freedom to do whatever he may desire; he may not be with his family, or *attend a theatre* or other place of amusement."

The theory of the Court, as affirmed by the majority, seemed to be that if there existed any sacrifice of absolute freedom of conduct of any kind, the employee's time during such restriction was working time.

There are many restrictions upon personal freedom in the absolute, which arise from the mere status of employment. For example, any employee who elects to reside sufficient distance from his place of employment to necessitate one hour of travel from his home to his office every morning, during that hour he "has not freedom to do what he desires, he may not be with his family, or attend a theatre or other place of amusement." Yet he is surely not working.

Similarly, although the evening time of an employee, working normal hours—nine to five,—is ordinarily thought to be his own, yet his very status as an employee requires the relinquishment of many personal liberties in the absolute. He may not, during his evening, so indulge in carousal or such other activity as make him unfit for duty the next morning. He may not deprive himself of necessary sleep to the extent that his efficiency be affected the following day. Nor may he take a trip after working hours, of such magnitude as prevents him from being at work the following day, at the appointed hour.

The duty to keep fit, the duty to be at work at the appointed time, all arise out of the mere status of employment. Those duties are accepted, whenever employ-

ment is accepted. They are accepted as a matter of contract. So was the slight limitation upon the ability of these employees to "attend a theatre." They accepted that slight limitation upon their absolute freedom, just as does an employee who accepts employment at a point two hours distant from his home. In addition to his work day he accepts the invasion of his absolute liberty for the additional four hours per day when he may not "attend a theatre," because he must travel.

We think this Court was on sound ground when it defined "work" as used in the Act, *not* as meaning any minor and voluntary sacrifice of absolute freedom of conduct by the employee, but as *"actual work"* as meaning *physical or mental exertion* * * * *controlled* or *required* by the employer."

Conclusion.

We respectfully urge that certiorari of the decision above referred to is eminently necessary and justified.

Respectfully submitted,

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APPENDIX A.

Title 29, U. S. C. A.

Sec. 203. DEFINITIONS

As used in sections 201-219 of this title—

* * *

(g) "Employ" includes to suffer or permit to work.

* * *

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or *occupation necessary to the production thereof,* in any State.

Title 29, U. S. C. A.

Sec. 207. MAXIMUM HOURS.

(a) No employer shall, except as otherwise provided in this section, *employ* any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his *employment* in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is *employed.*